EDITOR'S NOTE

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NO. 87-620

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IN THE SUPREME COURT
OF THE UNITED STATES

(October Term 1987)

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BARRY KRUPKIN, ET AL.,
Petitioners,

versus

DOW CHEMICAL CO, ET AL.,
Respondents.

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

*

REPLY BRIEF OF PETITONERS TO BOTH BRIEFS IN OPPOSITION FILED BY RESPONDENT CHEMICAL COMPANIES AND THE PLAINTIFFS' MANAGEMENT COMMITTEE

BENTON MUSSLEWHITE
609 Fannin, Suite 517
Houston, Texas 77002

TODD ENSIGN
Citizen Soldier
175 5th Ave
New York, N.Y. 10010

STEPHEN L. TONEY
Werner, Beyer, Lingren & Toney
308 St. John's Place
New London, WIS.
54961

RICHARD ELLISON
22 W. Ninth St.
Cincinnati, Oh 45202

MARLENE P. MANES
914 Main St, Rm. 200
Cincinnati, Oh 45202

ATTORNEYS FOR PETITIONERS

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I.
PRELIMINARY STATMENT

For simplicity we will refer to the Opposition Brief of the Respondent Chemical Companies as the "Monsanto Brief" (the first company named) and the Opposition Brief of the Plaintiffs Management Committee as the "PMC Brief".

Some preliminary observations are in

order. As Respondents have repeatedly done on prior occasions, see, e.g., *In re Agent Orange Product Liability Litigation*, 800 F.2d 14 (2 Cir. 1986), they once again seek to impugn the motives of the undersigned counsel by stating that he chose to oppose the settlement only because of Judge Weinstein's low fee award to him, see Monsanto Brief, pp. 23, 24 and PMC Brief, pp. 14, 15. They do this despite the fact that they know - as the only sworn proof in the record establishes, see Doc. 5600, and as the Court of Appeals has previously found in a final judgment, 800 F.2d at 16, 17 - that undersigned counsel launched his crusade against the settlement not because of any peevishness about the fees but because he became "disenchanted with the purported settlement".[1]

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1. 800 F.2d at 16, 17. Indeed, undersigned counsel announced his opposition to the settlement in December of 1984, ***before*** Judge Weinstein made his fee awards in January 1985, Doc. 5600, and the more likely scenario is that Judge Weinstein made the fee awards and remarks

We mention this because we perceive that such remarks are being repeatedly utilized in an effort to discredit the undersigned counsel's question-and-answer affidavit, which was totally uncontroverted in the district court and which indisputably established the improvidentiality of the purported settlement. See Petition at 13-27.[2]

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about all counsel in a manner so as to punish the only two attorneys who had been on the PMC and had dared oppose the settlement (undersigned counsel and Ashcraft and Gerel), precisely because they opposed the settlement. See 611 F.Supp. at 1332, 1367.

2. There is no maudlin desire on the part of undersigned counsel to assume the posture of a lonely crusader in this case. To be sure, undersigned counsel, as the Court of Appeals observed, urged "the other members of the PMC to reject the settlement, and to challenge the settlement on appeal", 800 F.2d at 17, and there was certainly no desire to go it alone. But, the decision for the undersigned counsel was clear and compelling. Simply stated, the Agent Orange "settlement" constitutes an unmitigated disaster - a judicial disgrace that we have no choice but to urge this Honorable Court to rectify.

II.
There Are Several Valid Grounds For The Exercise of Certiorari Jurisdiction

The main thrusts of the Opposition Briefs as to why the Court should not invoke certiorari jurisdiction are: because this case is "sui generis" and, therefore, a decision by this Court "would have acutely limited precedential value"; a review by this Court consists primarily of a factual review; the Petitioners failed "to identify a single pertinent conflict in the circuits or with any decision of this Court"; and this litigation involves no important questions of federal law or policy. Monsanto Brief at 12-14 and PMC Brief at 8-14. The Respondents are wrong on all counts.

A. This Litigation Clearly Involves Issues Which Will Have Precedential Value and "Pertinent Conflicts" Among The Circuit Courts or With This Court.

The following examples fully demonstrate the superficiality of Respondents' arguments:

(1) **Certification of the Class.** The question of whether a Rule 23(b)(3) class should ever be certified in mass accident or chemical exposure cases involving a large number of victims with serious injuries or deaths obviously has significant precedential value because such types of incidences are on the increase. There is no secret that an extremely important debate is presently raging among members of the American Trial Lawyers Association about the use of class actions in mass tort, including toxic tort, litigation. There are those who subscribe to the thinking expressed in ***In re Northern Dist. of Cal. Dalkon Shield IUD Product Liability Litigation***, 693 F.2d 847 (9 Cir. 1982), cert den. 459 U.S. 1171, see discussion at 35-39 of Petition. while there are others who believe that class actions are the ultimate solution to almost all mass tort situations. This

latter group has continued its class action crusade. for example those involving the Bhopal disaster and Bendectine exposure. See *In re Bendectine Products Litigation*, 749 F.2d 300 (6 Cir. 1984) and *In Re Union Carbide Corp. Gas Plant Disaster,* 809 F.2d. 195 (2 Cir. 1987), cert den. In addition, the Court of Appeals virtually concedes that its decision to affirm certification of the Agent Orange class runs counter to the holding of the Ninth Circuit in *Dalkon Shield* and other cases. 818 F.2d at 164.

(2) **The role of the district judge in class actions.** The role of a district judge in Rule 23 class actions is an issue that, once clarified by this Court, will affect every federal class action case henceforward. Can a judge in any class action dictate the terms of a proposed settlement and aggressively orchestrate the negotiation process and then be counted upon to *objectively* decide whether

the settlement is fair, adequate and reasonable? See Petition at 39-42.[3] In view of the virtually unlimited power a district judge is facially given in Rule 23 class actions, in the form of "discretion", this case is the appropriate one, we respectfully submit, for this Court to review and establish the limits of that power. If it be argued that Judge Weinstein's aggressive conduct is but an isolated aberration and therefore no precedential value will attach, the obvious reply, and a valid one, is that it can certainly happen again as long as judges are human beings and Rule 23 remains unchanged. Moreover, the Court of Appeals' ratification of Judge Weinstein's aggressive domination of the settlement negotiations is clearly in conflict with

3. There are other manifestations of this abuse of power, such as Judge Weinstein's arbitrary disfranchisement of large subgroups, such as the women and children. See Petition at 25, 26. See also ***Holmes v. Continental Can Co.***, 706 F.2d 1144 (11 Cir. 1983).

the principles discussed in ***Plummer v. Chemical Bank***, 668 F.2d at 654, 655 666 (2 Cir. 1982); ***Pettway v. American Cast Iron Pipe Co.***,576 F.2d 1157, 1172 (5 Cir.1978); and ***In re General Motors***, 594 F.2d 1106, 1125 (7 Cir. 1979), cert den 444 U.S. 870.[4]

(3) **The pre-notification process issue.** The resolution of the question of whether a district court should - where the number, size and kinds of claims are unknown - generally always conduct a pre-notification hearing process, including a claims analysis and formulation of the distribution plan, so as make clear to each member of the class the "unit of recovery", will also have broad preceden-

4. This Court has demonstrated that it is willing to grant certiorari to review abuses of judicial power. See, e.g., ***Valley Forge College v. Americans United***, 454 U.S. 464, 490 (1982)("Because we are unwilling to countenance such a departure from the limits of judicial power contained in Article II, the judgment of the Court of Appeals is reversed.") and ***Evans v. Jeff***, 106 S.Ct. 1531, 1537 (1986).

tial value. The courts in *all* class actions involving the assertion of damages must establish a "unit of recovery" for each category of claimants - that is the essence of settlement enlightenment. See for example, *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5 Cir. 1981) and see Petition at 44-48. In addition, the holding of the Court of Appeals in these matters is contrary to the direct rationale of the Seventh Circuit's decision in *In re General Motors*, 594 F.2d at 1124-1126, as well as the dicta rationale of the Fifth Circuit in *In re Corrugated Container*, 643 F.2d at 224.[5]

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5. The Court, in *In re Corrugated Containers Antitrust Litigation*, a case cited and relied upon by the Respondents, recommended that all settlement notices contain information as to "units of recovery," 643 F.2d at 224, but upheld the notice in that case because the members with the larger claims "had the sophistication to estimate an approximate amount they would secure from the settlements". *Id.* In this case, precisely the opposite is true - few, if any, of the claimants, including those with the larger claims, are sophisticated in that context.

(4) Failure to give class members the right to opt-out of settlement. Another issue with overwhelming precedential impact is the question of whether constitutionally - even though Rule 23 does not expressly require it - a district court should, particularly in a case of this type, permit members of the class to opt-out of a proposed settlement *after* the "unit of recovery" has been established with respect to each claimant. A ruling upon this vital issue will affect *all* future class actions where damages are sought and the unit of recovery is *not* known at the inception of the litigation - which of course will include the vast majority of class action cases. See Petition at 48-51. Moreover, the holding of the Court of Appeals, while consistent with such cases as *Officers for Justice v. Civil Service Commission*, 688 F.2d 615 (9 Cir. 1982), is directly contrary to the express mandate that the notice of a class

settlement include the option "to state a desire for exclusion" as one of the three "important" alternatives each member of the class must be given in connection with a class settlement. See *Greenfield v. Villages Industries*, 483 F.2d 824, 832 (3 Cir. 1973); *Pettway*, 576 F.2d at 1182; *In re Corrugated Containers*, 643 F.2d at 223 ("whether one or two notices are employed", each member of the class should be allowed to "opt-out of the class settlement"); *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834, 842, 843 (10 Cir 1974); and see Petition at 48-51.[6]

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6. The action of the Court of Appeals in this case was particularly erroneous because the Monsanto Respondents had been given the opportunity, in the May 7, 1984 tentative settlement agreement, to unilaterally cancel the settlement if they concluded that so many members of the class had opted-out as to make the settlement unfeasible from their standpoint. Such provision certainly neutralizes the criticism expressed in *Officers for Justice*, 688 F.2d at 635, that to include the right to opt-out in the settlement notice would discourage class action defendants from settling because "defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims."

(5) **The prima facie rule in "nuisance value" settlements.** Another crucial issue at stake, with heavy precedential value, is whether the Court will adopt the "prima facie rule", which was enunciated in *City of Detroit v. Grinnell*, 495 F.2d 448 (2 Cir. 1976)("*Grinnell I*"), see Petition at 54, 55, so that in *all* class actions, where the settlement offer amounts "to only a fraction of the ultimate possible recovery" and the plaintiffs have what appears to be a "prima facie case" on liability, 495 F.2d at 455, it will generally be an abuse of discretion to approve such a settlement.

(6) **Prima facie case as to medical causation; *In Re Agent Orange vs. Ferebee*.** In determining whether there was a prima facie case on liability, the two crucial questions, according to the Court of Appeals, 813 F.2d at 164, 165, 187, were medical causation and the military contract defense. As to medical causation,

a decision which will affect *all* chemical exposure and toxic tort personal injury litigation (individual as well as class action) - litigation which is certainly in the public interest and is becoming much more frequent - will be whether plaintiffs can survive summary judgment where the defendants, who always have much greater financial resources than plaintiffs, have procured negative epidemiological studies and the plaintiffs have been financially unable to respond in kind. Put another way, can epidemiological studies sponsored by the defendants conclusively negate medical causation *regardless* of what the other clinical, medical, toxicological and expert opinion evidence might be? In that regard, we respectfully submit that the Court should resolve the irreconcilable divergence between the Court of Appeals in this case and *Ferebee v. Chevron Chem Co.*, 736 F.2d 1529 (D.C.Cir.), cert den 105 S.Ct. 545 (1984). As we state in the

Petition, this Court's decision on that crucial issue could very well decide whether future toxic tort litigation is realistically viable. See Petition at 61, 62.

(7) **The military contract defense; bringing order out of chaos.** This Court has apparently recognized the precedential importance of questions involving the military contract defense by granting certiorari in ***Boyle v. United Technologies Corp.***, 107 S.Ct. 872. The primary issue at stake here is whether the ***novel*** formulation adopted by the Court of Appeals should be the law of the land.[7] Such novel formulation is in direct conflict with some of the other Courts of Appeals and is in greater to lesser shades of

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7. This Court has frequently granted certiorari to pass upon "novel" issues. See, e.g., ***Valley Forge College v. American United***, 454 U.S. at 470 ("Because of the unusually broad and novel view ... adopted by the Court of Appeals, we granted certiorari.").

conflict with others.[8] See Petition at 55-60 and the cases there cited and discussed. This Court should, we say respectfully, bring order out of chaos in this area of the law and such marshalling of judicial precepts should include this case.

(8) **Alteration of the settlement by Judge Weinstein.** Lastly, a question which potentially pervades all class action settlements is whether a district judge can unilaterally alter the material terms of a settlement negotiated by the parties. Though the Monsanto Respondent incomprehensibly argues that Petitioners' "claim that the district court unilaterally altered the settlement agreement is incomprehensible," Monsanto Brief at 22, Judge Weinstein's arrogation to himself of the

8. In *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979), this Court granted certiorari even though the conflicts amoung the "various courts" were not necessarily specific and diametrical but consisted of "[d]iffering views" on the issue in question.

power to unilaterally devise a distribution plan contrary to the plan devised by class counsel, ***is undisputed***. The PMC assumed that the settlement agreement it negotiated was based on tort concepts of cause and effect. This is demonstrated by its proposed distribution plan, which was rejected by Judge Weinstein. See discussion of the PMC plan in 611 F.Supp. 1396 at 1407-1410 and 813 F.2d at 182, 184. Moreover, the affirmation by the Court of Appeals of Judge Weinstein's right to formulate a distribution plan contrary to the wishes of the PMC seems to run counter to this Court's reasoning in ***Evans v Jeff***, 106 S.Ct. 1531, 1537 (1986) ("Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection.").[9] For other authorities, see Petition at 39, 40.

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9. The Respondents argue that many questions pertaining to the settlement are but factual determinations confirmed by

B. In The Final Analysis This Court Has Frequently Granted Certiorari Solely Because The Issues Are Imporatnt Or of "National Significance" Or Involve Federal or Constitutional Issues.

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two courts below and therefore are inappropriate for certiorari relief. See PMC Brief at 12, 13, and Monsanto Brief at 12, 13. But this misperceives the nature of the questions involved. Because of the summary judgment (prima facie case) gloss on the "reasonableness" of the settlement issue, see ***Grinnell I,*** questions pertaining to the merits of the case must be examined in the light of this Court's holding in such summary judgment cases as ***Adickes v. Kress***, 398 US 144 (1970). This Court has frequently granted certiorari in cases involving summary judgment issues. See, e.g., ***Adickes*** and ***Poller v. C.B.S.***, 368 U.S. 464 (1962). The factual matters concerning the negotiating process, post-settlement procedures and other considerations concerning the reasonableness and fairness of the settlement are undisputed in the record by virtue of the uncontradicted affidavit of the undersigned counsel and others submitted by the objectors. (It must be remembered that Judge Weinstein, in violation of the rule set forth in ***In re General Motors***, refused to permit discovery on the settlement issues). In any event, this Court has not hesitated to grant certiorari to resolve factual issues which, as here, are an integral part of overriding legal questions. See, e.g., ***NLRB V. Waterman Steamship Corp.***, 300 U.S. 206, 207-209 (1939) and ***Furnes Corp. v. Waters***, 438 U.S. 567 (1978)("We granted certiorari to consider questions raised by this case regarding the exact scope of the prima facie case and the nature of the evidence necessary to rebut such a case.")

The cases in which this Court has granted certiorari solely or primarily because the issues are important or of national significance or involve federal or constitutional issues, are legion.[10] And the Court has repeatedly deemed Rule 23 class action litigation important enough to justify the granting of certiorari. See, e.g., ***Evans v. Jeff***, 106 S.Ct. at 1536 ("The importance of the question decided ...."); ***Eisen v. Carlisle & Jacqueline***, 417 U.S. 156 (1974); and ***Phillips Petroleum Co. v. Stutts***, 105 S Ct 2965 (1985).

We do not believe Respondents can really be serious in their contention that this

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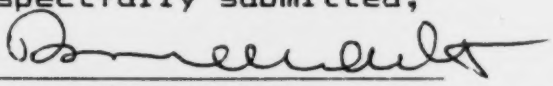
10. See e.g., ***U.S. v. Janis***, 428 U.S. 433 (1976) ("Because of the obvious importance of the question, we granted certiorari"); ***Nabraska Press Ass'n v. Stuart***, 427 U.S. 539 (1976)("We granted certiorari to address the important issues raised. . .."); ***Fitzpatrick v. Bitzer***, 427 U.S. 445 ("We granted certiorari to resolve this important constitutional question"); ***Parker v. Flook***, 437 U.S. 584 (1978) ("importance of question"); and ***National Broiler Marketing Assn' v. U.S.***, 436 U.S. 816 (1978)("importance of the issue").

litigation is not sufficiently important to this nation to justify review by our Court of last and highest resort. To contend this, Resondents have to be saying that the Vietnam veterans and their families are not that important; that the issues, relating to defendants who conspired in 1965 to allow the continued contamination of our own fighting military personnel with a chemical they knew contained one of the deadliest toxic compounds known to man, are not that important; that such powerful questions as constitutional due process - the right of individuals not to have their right to their "day in court" stripped from them without their "knowing consent" - are not that important; and that consideration of overriding environmental issues - which completely permeate this litigation - are not that important to our nation as a whole.

The Respondents, Judge Weinstein, and the Court of Appeals speak of a need for a national reconcilation by bringing this

litigation to an end. However, sweeping burdensome litigation under the rug without review by the Highest Court in our land will never provide the reconcilation that is desperately needed and deserved by the Vietnam veterans and their families. The Respondent Chemical Companies knowingly deceived them. Their Government rejected them. They believe their class counsel failed them. The district judge finessed them. The Court of Appeals looked the other way from them. Only a hearing before this Court will finally reconcile them.

Respectfully submitted,



Benton Musslewhite
Attorney of Record for
the Petitioners
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288